IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 27TH SEPTEMBER 2007 / 5TH ASWINA 1929

SA.No. 858 of 1994(B)

AS.77/1990 of SUB COURT, THIRUVALLA
OS.88/1986 of MUNSIFF COURT, THIRUVALLA
.....

APPELLANT/RESPONDENT/PLAINTIFF:

OMANA OF KOLLAMPARAMBIL VEEDU, VALLAMALA MURI,
KUNNAMTHANAM VILLAGE.

BY ADV. SRI.P.R.VENKITESH
SRI.P.R.VENKETESH
SRI.C.MURALIKRISHNAN (PAYYANUR)

RESPONDENTS/2ND RESPONDENT & APPELLANT & RESPONDENTS 3 &4/
DEFENDANTS:
---

1. JANAKI OF MELEKKOOTTU VEEDU, VALLAMALA MURI,
KUNNAMTHANAM VILLAGE.

2. JANARDHANAN, -DO- -DO- -DO-

3. PARAMESWARAN, -DO- -DO- -DO-

4. KARUNAKARAN, -DO- -DO- -DO-

BY ADV. SRI.SUBHASH CYRIAC

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 27/09/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

ORDER ON C.M.P.NO. 1982/94 IN SA 858/94

DISMISSED

27/9/2007

SD/-M.SASIDHARAN NAMBIAR,JUDGE.

//True copy//

PA to Judge.

M.SASIDHARAN NAMBIAR,J.

S.A.NO. 858 OF 1994

Dated 27th September 2007

J U D G M E N T

Plaintiff in O.S.88 of 1986 on the file of Munsiff court, Thiruvalla is the appellant. Defendants are respondents. Appellant instituted the suit seeking a decree for permanent prohibitory injunction contending that plaint schedule property belongs to her husband as per Ext.A1 settlement deed of 1982 and as her husband is employed abroad she is in possession of the property and respondents are in possession of the property to the west of plaint schedule property and separating the two properties there is an old boundary kayyala and respondents attempted to construct a compound wall enclosing a portion of the plaint schedule property and they have no right to do so and therefore they are to be restrained by a permanent prohibitory injunction. Respondents in their written statement contended that appellant is not entitled to institute the suit as property belongs to her husband and her husband encroached on a portion of

the property of respondents and constructed a car porch extending it to their property of husband of appellant and thereafter instituted the suit and they have no intention to trespass into the property and appellant is not entitled to the decree sought for.

2. Learned Munsiff on the evidence of Pws.1 to 4, Dws.1 to 4, Exts.A1, C1 and C1(a) granted a decree for permanent prohibitory injunction holding that compound wall as noted by the Commissioner in Ext.C1(a) sketch is existing separating the property of the appellant and respondents have no right to trespass into the property of the appellant. Second defendant challenged decree and judgment before Sub court, Thiruvalla in A.S.77 of 1990. Learned Sub Judge on re-appreciation of evidence found that appellant is claiming right and possession under Ext.A1 settlement deed whereunder husband of appellant was allotted only 14 cents of land and no excess land was allotted and plaint schedule property is 14 cents and excess land and as appellant cannot claim more extent than what was obtained under Ext.A1, decree for injunction cannot be granted. On appreciation of evidence it was also found that case of respondents was that husband of appellant had encroached upon portion of their

property and there was a mediation and in such circumstances, without identifying and fixing the property, a decree for injunction cannot be granted. Appeal was allowed and decree granted was set aside and suit was dismissed. It was challenged in the second appeal.

3. Appeal was admitted formulating following substantial questions of law.

> 1) When plaintiff is in possession of the property, is he not entitled to a decree for permanent prohibitory injunction restraining respondents from trespassing into the property irrespective of the question of title.
>
> 2) Whether on the evidence first appellate court was justified in disturbing the finding of the trial court by evaluating the evidence.

4. Learned counsel appearing for appellant was heard. Argument of learned counsel is that Ext.C1 report and C1(a) sketch establish that a compound wall separating the plaint schedule property from the western property of respondents and what was contended by respondents in the written statement was that husband of appellant encroached upon a portion of their property and

constructed a car porch and evidence establish that car porch is further to the east of the existing compound wall and even in the written statement existence of compound wall is admitted and therefore first appellate court could not have interfered with the findings of the trail court that appellant is in possession of the plaint schedule property and she is entitled to the decree sought for. It was also argued that even according to respondents there was a mediation and respondents were advised to keep quiet and in such circumstance they have no right to trespass into the plaint schedule property and in the written statement there is no case that appellant did not obtain any virivu and in such circumstance decree granted by the trial court is to be restored and that of first appellate court is to be set aside.

5. A decree for injunction could be granted only in respect of an identifiable specified plot. Though Ext.C1 report shows that Commissioner has identified the property, that identification was not with reference to Ext.A1 title deed, but on the basis of boundaries shown to him at the time of inspection. Ext.A1 is only a photostat copy and not even a registration copy of the

original document which could be looked into. Even if ignoring the defect it is looked into it does not establish that apart from 14 cents, husband of appellant was allotted any excess land. Plaint schedule property is described as not 14 cents covered under Ext.A1 but 14 cents plus excess land. This additional excess land in the plaint schedule property cast suspicion with regard to the case set up by respondents that appellant had encroached upon a portion of their property as otherwise appellant could not claim excess land than 14 cents, especially when there is no case that husband of appellant obtained possession of any excess land after Ext.A1 settlement deed.

6. From the contentions raised in the plaint and written statement, it is clear that dispute is actually with regard to the exact boundary separating the property of respondents and husband of appellant. It is true that in the written statement it was admitted that there is a compound wall separating the properties lying north-south. It is also true that Commissioner has shown a compound wall which according to appellant was existing. But on a careful analysis of the evidence it is clear that compound wall found by the Commissioner is not

exactly the old wall which was in existence. On the northern portion of the western compound wall some modification was affected, after construction of the car porch. According to respondents, husband of appellant encroached upon their property. It is in such circumstance, first appellate court found that appellant is not entitled to the decree sought for.

7. Question is if compound wall was constructed encroaching upon a portion of the property of respondents, without identifying and establishing that the compound wall newly added is on the exact boundary of the property, whether appellant is entitled to the discretionary relief of injunction. If respondents have title to that portion of the property, unless appellant could claim that he has been in settled possession of the property she is not entitled to a decree as against the true owners. Even according to appellant modification on the northern portion of the compound wall was made only after Ext.A1 settlement deed in 1982. Therefore with regard to that portion appellant cannot claim that she or her husband has been in settled possession of the property. If that be so, without fixing the exact boundary, appellant is not entitled to a decree for

injunction sought for. If that be so, appellant is not entitled to contend that as there is a compound wall separating the property, she is entitled to a decree for injunction. In such circumstance, I find no reason to interfere with the findings of first appellate court. Appellant is not entitled to the decree sought for. It is made clear that dismissal of the suit will not affect the right of the parties to claim title in an appropriate suit.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

==========

M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO.858 OF 1994

27th September 2007

==========